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IN THE
COURT OF APPEALS OF INDIANA

THURSTON J. JORGENSON, JUDITH B. WOLFORD, GWEN HURD and JEFF HAM,	)	
Appellants-Petitioners,	)	
vs.	)	No. 46A03-0708-CV-380
MICHIGAN CITY, INDIANA BOARD OF ZONING APPEALS and MERIDIAN, LLC,	)	
Appellees-Respondents.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0511-PL-245

September 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Thurston J. Jorgenson, Judith B. Wolford, Gwen Hurd, and Jeff Ham ("Appellants") appeal the resolution of their writ of certiorari challenging the Michigan City Board of Zoning Appeals' ("BZA") grant of a petition by Meridian, LLC, for a special use variance, developmental standard and bulk variances, and a non-conforming use variance. We affirm the BZA's order.

FACTS AND PROCEDURAL HISTORY

In early 2005, the land at 213 California Avenue, Michigan City, Indiana, was occupied by a run-down five-unit apartment building nicknamed "The Hotel California." (App. at 490.) In May of 2005, Meridian purchased the property with the intention of removing the apartments and constructing three three-bedroom condominiums. The remaining lots on the block contain single-family residential houses.

Meridian submitted a plan to the Michigan City Planning Department and requested a building permit. The Planning Department's Zoning Administrator, Joseph Siegel, approved the building permit pursuant to "prior instructions" to approve similar projects in the area. (App. at 81.) When he approved the plan, Siegel knew Meridian intended to expand the foundation of the building and that numerous other variances would be required for compliance with the relevant portions of Michigan City's Comprehensive Zoning Ordinance ("CZO"). Meridian received the building permit in July of 2005 and tore the apartment building down to the foundation. Then, a number of remonstrators, including Appellants, filed a petition with the Michigan City Board of Zoning Appeals ("BZA") to rescind Meridian's permit. Meridian thereupon voluntarily abandoned its permit.

On September 23, 2005, Meridian sought a special use variance to build one single-family attached and two single-family semi-attached dwellings, bulk and developmental standard variances regarding minimum lot area and setbacks, and a determination of non-conforming use status. Appellents remonstrated. After a hearing, the BZA granted Meridian's petition with no conditions.

Appellants filed a petition for writ of certiorari requesting the trial court reverse the BZA's grant of variances, withdraw the building permit, and order the structure torn down.[1] After a two-day hearing, the court determined the cause had to be remanded to the BZA for more specific findings regarding the requirements for granting the variances. (*See* App. at 962-64.)

On remand, the BZA entered new findings approving Meridian's petition without hearing additional evidence. Following those entries, Appellants again asked the court to reverse the BZA's grant of the variances and order the condominiums torn down. The trial court affirmed the BZA's grant of the developmental standard variances, reversed the special use variance, declined to address the nonconforming use variance, remanded to the BZA for a new hearing on the merits of Meridian's petition for a special use variance, and denied both parties' requests for attorney fees.[2]

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[1] By this time, Meridian had completed the condominiums.

[2] On January 5, 2008, Jorgenson filed a Supplemental Appendix containing an order entered by the trial court on December 3, 2007. That order indicates that after the trial court entered the order at issue herein, the BZA held the new hearing on Meridian's petition for a special use variance on July 10, 2007; the BZA granted that variance with findings of fact; Jorgenson filed another petition for writ of certiorari; and the trial court affirmed the BZA's grant of that variance.

Pursuant to Indiana Appellate Rule 8, we acquire jurisdiction over a case "on the date the trial court clerk issues its Notice of Completion of Clerk's Record." "Once an appeal has been perfected to the

DISCUSSION AND DECISION

When we review a BZA's action, we apply the same standard as the trial court. *Schlehuser v. City of Seymour*, 674 N.E.2d 1009, 1013 (Ind. Ct. App. 1996). The function of the trial court when reviewing the BZA's decision is simply "to determine if the evidence before the Commission taken as a whole provides a reasonable evidentiary basis for its decision." *Van Vactor Farms, Inc. v. Marshall County Plan Comm'n*, 793 N.E.2d 1136, 1148 (Ind. Ct. App. 2003), *trans. denied* 812 N.E.2d 790 (Ind. 2004). To reverse the grant of a variance, "an appellant must show that the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding and decision of the board does not rest upon a rational basis." *Snyder v. Kosciusko County Bd. of Zoning Appeals*, 774 N.E.2d 550, 552 (Ind. Ct. App. 2002), *trans. denied* 792 N.E.2d 33 (Ind. 2003).

"A zoning board has the power within its discretion to approve or deny a variance from the terms of a zoning ordinance." *Schlehuser*, 674 N.E.2d at 1013. "We presume the determination of the board . . . is correct," *Snyder*, 774 N.E.2d at 552, and "afford

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Court of Appeals or to the Supreme Court, the trial court has no further jurisdiction to act upon the judgment appealed from until the appeal has been terminated." *Schumacher v. Radiomaha*, 619 N.E.2d 271, 273 (Ind. 1993). The same rule applies to the BZA. *See, e.g.*, *Carter v. Allen*, 631 N.E.2d 503, 507-08 (Ind. Ct. App. 1994) (where trial court had been divested of jurisdiction by Court of Appeals' acquisition of jurisdiction, all actions taken by a County Board of Commissioners pursuant to the trial court's remand were void). "This rule facilitates the orderly presentation and disposition of appeals and prevents the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment." *Southwood v. Carlson*, 704 N.E.2d 163, 165 (Ind. Ct. App. 1999) (internal citations omitted). "Where a trial court, having once had jurisdiction, has been divested of that jurisdiction and still attempts to exercise its power, its actions are void." *Carter*, 631 N.E.2d at 507.

Accordingly, all actions taken by the BZA and trial court after July 9, 2007 – the date on which the trial court clerk issued its Notice of Completion of Clerk's Record and we thereby acquired jurisdiction over the underlying action – are void.

great weight to the decision of the board . . . by virtue of its experience in this given area." *City of Hobart Common Council v. Behavioral Institute of Ind., LLC*, 785 N.E.2d 238, 255 (Ind. Ct. App. 2003). We resolve all doubts about facts in favor of the BZA's decision, without reweighing the evidence or reassessing the credibility of the witnesses. *Id.* at 254-55. If the evidence is sufficient to uphold the BZA's decision, we must do so. *Id.* at 255. We may not try the facts *de novo* or substitute our judgment for that of the zoning board. *Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), *trans. denied sub nom. Hoosier Outdoor Adver., Inc. v. Monroe County*, 860 N.E.2d 590 (Ind. 2006). However, we conduct a *de novo* review of any questions of law decided by the agency. *Id.* We may not reverse the BZA's decision "unless an error of law is demonstrated." *Schlehuser*, 674 N.E.2d at 1013; *see also* Ind. Code § 4-21.5-5-14(a) (placing burden on party alleging error).

With this standard in mind, we review the BZA's findings and decision.

1. Special Use

The property at issue is in a neighborhood zoned as an "R2" district. The CZO Preamble to its Article on Residential Districts explains: "The R2 district is formulated to protect older areas within the city which are substantially built up with single-family detached dwellings on relatively small lots." CZO § 160.040. A single-family detached dwelling is a "permitted use" in an R2 district. CZO § 160.042. The condominiums Meridian wanted to build on the property were one single-family attached dwelling and two single-family semi-detached dwellings. Single-family attached and single-family semi-detached dwellings are "special uses" in an R2 district, CZO § 160.042, and "may

be permitted when a determination is made that the use will more effectively utilize an irregular shaped or oversized lot, or where a more compatible relationship of uses will result." CZO §§ 160.042 & 160.043.

A BZA's decision on application for special use is to be based on the following seven factors:

> (1) The special use being requested is specified in this chapter as a permissible special use within the zoning district which is applicable to the property in question.
> (2) The establishment, maintenance, or operation of the special use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare.
> (3) The special use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purpose already permitted, nor substantially diminish and impair property values within the neighborhood.
> (4) The establishment of the special use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
> (5) Adequate utilities, access roads, drainage, or other necessary site improvements have been or are being provided.
> (6) Adequate measures have been or will be taken to provide ingress and egress to designed as to minimize traffic congestion in the public streets.
> (7) Conformance to special conditions outlined in the chapter for the use being requested.

CZO § 160.126.

As for Meridian's petition for a Special Use variance, the BZA's amended order provided:

> 1. That the SPECIAL USE requested is specified in the Zoning Ordinance as a permissible special use within the zoning district which is applicable to the property in question.
> *The Petition of Meridian, LLC for a special use to construct a single-family attached and two single-family semi-attached dwellings at the property commonly known as 213 California Ave., Michigan City, Indiana is a*

permissible special use in accordance with Michigan City Ordinance 160.042(A).

2. That the SPECIAL USE requested will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare, because of the facts as follows:

The structures proposed and subsequently constructed by the Petitioner are constructed with maintenance free materials, fiber cement siding, tempered glass railings and have a sprinkler system installed to protect the surrounding properties in case of fire (See Transcript of the Proceedings held before the BZA on October 11, 2005 (hereinafter Tr.), page 12 and 14). Further, the proposed structures are intended to be sold rather than rented (Tr. 84) and replace an older rundown five unit rental apartment complex which was in a state of obsolescence or dilapidation and previously caused the area many problems due to the noise, fireworks, drinking, garbage, traffic congestion and pedestrian congestion (See Tr. 12, 28, 34, 37, 53, and 76). The Petitioner's intent to sell the structures rather than rent the structures will likely reduce the previously mentioned health and safety issues in the area. Further, parking in the area which is plagued by an extreme shortage will also improve in the area because the proposed structures each allow for one and a half spaces of off street parking in accordance with the Michigan City Zoning Ordinance (Tr. 16, 18, 45 and 78).

3. That the SPECIAL USE requested will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purpose already permitted, nor substantially diminish and impair property values within the neighborhood, because of the facts as follows:

The structures proposed and subsequently constructed by the Petitioner improve the property values within the neighborhood and are not injurious to the use and enjoyment of other property in the immediate vicinity because they are quality construction which will beautify the neighborhood, add additional value to the existing homes and additional tax revenue for the City of Michigan City (Tr. 21, 38, 54, 59). The BZA's approval of the requested special use is consistent with the Board's previous history of decisions where special use and variance approvals were made where necessary to revitalize the area and replace older dilapidated structures with new development, (Tr. 76). Further, since the prior apartment complex has been replaced with three town houses to be purchased instead of rented, many of the problems in the area due to noise, fireworks, drinking, garbage, traffic congestion and pedestrian congestion should be reduced to allow for more enjoyment of the property in the immediate vicinity (See Tr. 12, 28, 34, 37, 53, and 76). Parking in the area which is in extreme shortage and has impacted the enjoyment of the surrounding properties will also be improved because the proposed structures each

allow for one and a half spaces of off street parking in accordance with the Michigan City Zoning Ordinance (Tr. 16, 18, 45 and 78).

4. That the SPECIAL USE requested will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district, because of the facts as follows:

The structures proposed and subsequently constructed by the Petitioner will not impede the normal and orderly development and improvements of the surrounding property for permitted uses because the proposed structures are the only feasible structures that fit in with the area and land use based on the cost of the land, the land's proximity to an extremely congested public parking lot and pedestrian right of way, as well as the land's proximity to the other multi-family dwelling in the area commonly known as Dunescape (Tr. 15, 19, 23, 24, 31, 32, 52, 69). Further, the structures proposed and subsequently constructed by the Petitioner improve the property values within the neighborhood because they are quality construction which will beautify the neighborhood, add additional value to the existing homes and additional tax revenue for the City of Michigan City (Tr. 21, 38, 54, 59).

5. That the SPECIAL USE requested will provide adequate utilities, access roads, drainage, and/or other necessary site improvements, because of the facts as follows:

Adequate utilities, access roads, drainage and/or other necessary site improvements either already exist or will be provided by the Petitioner to comply with all applicable statutes and City codes. Departmental reports indicate that the Petitioner will be able to make the necessary provisions for adequate utilities, access roads, drainage and/or other necessary site improvements, otherwise an unfavorable recommendation would have been made (Tr. 76-77).

6. That the SPECIAL USE requested will provide adequate measures for ingress and egress so designed as to minimize traffic congestion in the public streets, because of the facts as follows:

Adequate provisions for ingress and egress designed to minimize traffic congestion are provided by the Petitioner and no negative departmental reports have been filed by the Michigan City Police Department regarding potential traffic congestion (Tr. 76-77). Further, parking in the area will also be improved because the proposed structures each allow for one and a half spaces of off street parking in accordance with the Michigan City Zoning Ordinance (Tr. 16, 18, 45 and 78).

7. That the SPECIAL USE requested will conform to the special conditions as outlined in the Zoning Ordinance, because of the facts as follows:

The Petitioner complies with the applicable special conditions as outlined in Michigan City Zoning Ordinance Section 160.043(2), because a more

compatible relationship of uses will result because the structures proposed and later constructed by the Petitioners are the only feasible structures that fit in with the area and land use based on the cost of the land, the land's proximity to an extremely congested public parking lot and pedestrian right of way, as well as the land's proximity to the other multi-family dwelling in the area commonly known as Dunescape (Tr. 15, 19, 23, 24, 31, 32, 52, 69).

The BOARD NOW DECIDES that request no. B-114-05 BE AND IS HEREBY GRANTED, and further decides that the following condition(s) be imposed:

None.

(App. at 1014-16.) The trial court affirmed all of those findings except the fifth and sixth:

> 28. Section (C)(5) requires that the BZA consider whether adequate utilities, access roads, drainage, or other necessary site improvements have been provided. In the findings, the BZA simply states that all necessary improvements already exist or will be provided by the Petitioner. To support this position, they cite to the comments of Meridian's attorney at the hearing on the original petition. See Transcript p. 76, 77. The comments of counsel, of course, are not evidence. The BZA also refers to and relies on the Planning and Inspection Report completed by the Michigan City Planning Department on May 13, 2007, and the Report on the Petition of Meridian LLC-B-114-05. Report on the Petition of Meridian, LLC-B-114-05, Certification, document 21 (Dec. 5, 2005). In that report, R.E. Russell from the Michigan City Water Department, stated that he would like to see plumbing details for the unit to find out about water service needs. Al Walus from the Michigan City Sanitation Department had no comment, but noted that the owner should contact the Sanitary District to review the building's connection to the sanitary sewer. *There was no evidence in the record to support the conclusion that adequate utilities, access roads, drainage or other necessary site improvements would be available.*
>
> 29. Section (C)(6) requires that adequate measures be taken to provide ingress and egress designed to minimize traffic congestion. To support their conclusion that such measures will be in place, the BZA cites to the Departmental Reports, the opposition comments of Jeff Ham and the comments of Meridian's attorney. The findings note that parking will be improved, but does not address the issue of ingress and egress from the property. *There is no evidence to support the conclusion that there will be adequate ingress and egress designed to minimize the traffic congestion in*

this area.

(*Id*. at 14-15) (emphases added). Because it determined those findings were unsupported, the trial court reversed the BZA's grant of Meridian's petition for a special use variance.

On appeal, Appellants have not challenged the court's or BZA's findings regarding the requirements for a special use variance. However, on cross-appeal, Meridian alleges the court erred in reversing the special use variance granted by the BZA because the record contained evidence supporting the fifth and sixth findings. We agree.

As to utilities and plumbing in Section 5, Seigel testified on behalf of the Zoning Department that the Department "would recommend approval." (*Id*. at 560.) The record includes an eight-page Plan Review by the Planning & Inspection Department of the City of Michigan City, which was signed by the Plumbing Inspector on May 16, 2005, and a representative of the Sanitation Department on May 26, 2005. (*Id.* at 622-30.) Those signatures suggest those persons reviewed Meridian's plans and believed the building could be accommodated. We also note the trial court incorrectly stated the BZA supported that finding with "the comments of Meridian's attorney at the hearing on the original petition. See Transcript p. 76, 77." (*Id*. at 14.) The comments on those pages are by Joe Siegel of the Zoning Department. (*See id*. at 559-61) (containing Tr. at 75-77). Accordingly, the record supports the BZA's fifth finding regarding the special use variance.

As to parking and ingress/egress, Seigel testified a three-bedroom unit requires 1.5 spaces, which means Meridian was required to provide 4.5 parking spaces. The plans included three spaces under the carport and two additional spaces within Meridian's

property. Hardesty noted 213 California is next to a public parking lot where guests can park on the weekend. Park Superintendent Garbacik testified: "Anybody . . . could go and purchase either a sticker, annual pass, or even a daily pass . . . and then they could go park [in the public parking lot] without being ticketed or towed." (*Id*. at 552.) As for ingress and egress to the property, the record reveals 213 California Avenue is the final property where California Avenue dead-ends into the beach and a large wall signals the end of California Avenue. (*Id*. at 245, 263, 264, 294.) The only other persons who will access this section of California Avenue are those who wish to park in the public parking lot for beach access. This evidence supports the finding there is adequate ingress and egress from Meridian's property, and we affirm the BZA's sixth finding.

Because we find support for the two BZA findings the trial court overturned and because Appellants have not challenged the BZA's other findings and conclusions, we affirm the special use variance.[3]

2. Developmental Standard and Bulk Variances

The BZA's order regarding developmental standard and bulk variances provided:

> 1. That the DEVELOPMENTAL STANDARD VARIANCES REGARDING MINIMUM LOT AREA, DETERMINATION REGARDING NON-CONFORMING USE STATUS AND SETBACKS will not injure the public health, safety, morals and general welfare of the community because of the facts as follow:
>
> *The structures proposed and subsequently constructed by the Petitioner, as most structures in the Sheridan Beach area are non-conforming and have set back and other developmental standard violations which would require*

[3] Because we affirm the special use variance, we need not address Appellants' argument that the trial court erred as a matter of law when, on reversing the special use variance, it remanded to the BZA for a new hearing on the merits of Meridian's petition.

variance relief due to the small lot sizes in comparison to the structures located on the lots in the area (Tr. 8, 58). Further, the structures proposed and subsequently constructed by the Petitioner fit within the same foot print of the previous structure located on the property with the exception of the area filled within the "L" shape of the previous structure, which reduces the amount of ratio between the improved and unimproved space. (Tr. 12, 13). All other non-conforming side and back yard set backs are the same as with the prior structure (Tr. 14, 80). The new structures are a tremendous improvement to the area in comparison to the prior structure located on the property which was an older rundown five unit rental apartment complex in a state of dilapidation and which previously caused the area many problems due to the noise, fireworks, drinking, garbage, traffic congestion and pedestrian congestion (See Tr. 12, 14, 21, 28, 34, 37, 53, 76, 80). Further, the structures proposed and subsequently constructed by the Petitioner will not injure the public health, safety, morals and general welfare of the community because the new structures are built with maintenance free materials, fiber cement siding, tempered glass railings and have a sprinkler system installed to protect the surrounding properties in case of fire. (Tr. 12, 14). Further, the proposed structures are intended to be sold rather than rented (Tr. 84) and the Petitioner's intent to sell the structures rather than rent the structures will likely reduce the previously mentioned health and safety issues in the area. Lastly, parking in the area which is in extreme shortage will also be improved because the proposed structures each allow for one and a half spaces of off street parking in accordance with the Michigan City Zoning Ordinance (Tr. 16, 18, 45, 78).

2. That the DEVELOPMENTAL STANDARD VARIANCES REGARDING MINIMUM LOT AREA, DETERMINATION REGARDING NON-CONFORMING USE STATUS AND SETBACKS will not affect the use and value of adjacent property in a substantially adverse manner because of the facts as follows:

The structures proposed and subsequently constructed by the Petitioner improve the property values within the neighborhood and are not injurious to the use and enjoyment of other property in the immediate vicinity because they are quality construction which will beautify the neighborhood, add additional value to the existing homes and additional tax revenue for the City of Michigan City (Tr. 21, 38, 54, 59). The BZA's approval of the requested developmental standard variances and determination regarding non-conforming use status is consistent with the Board's previous history of decisions where variance approvals and non-conforming use status were made where necessary to revitalize the area and replace older dilapidated structures with new development. (Tr. 76) Further, since the prior apartment complex has been replaced with three town houses to be purchased instead of rented, many of the problems in the area due to noise,

fireworks, drinking, garbage, traffic congestion and pedestrian congestion should be reduced to allow for more enjoyment of the property in the immediate vicinity (See Tr. 12, 28, 34, 37, 53, and 76). Parking in the area which is in extreme shortage and has impacted the enjoyment of the surrounding properties will also be improved because the proposed structures each allow for one and a half spaces of off street parking in accordance with the Michigan City Zoning Ordinance (Tr. 16, 18, 45 and 78).

3. That the DEVELOPMENTAL STANDARD VARIANCES REGARDING MINIMUM LOT AREA, DETERMINATION REGARDING NON-CONFORMING USE STATUS AND SETBACKS of the zoning ordinance will result in practical difficulties in the use of the property, there is a condition peculiar to the property in which strict application of the zoning ordinance will be an unnecessary hardship on the [P]etitioner and the variance does not substantially interfere with the comprehensive plan, because of the facts as follows:

The structures proposed and subsequently constructed by the Petitioner, as most structures in the Sheridan Beach area are non-conforming and have set back and other developmental standard violations which would require variance relief due to the small lot sizes in comparison to the structures located on the lots in the area (Tr. 8, 58). Further, the strict application of the zoning ordinance will result in practical difficulties and create an unnecessary hardship on the Petitioner because the structures proposed and later constructed by the Petitioners are the only feasible structures that fit in with the area and land use based on the cost of the land, the land's proximity to an extremely congested public parking lot and pedestrian right of way, as well as the land's proximity to other the other [sic] *multi-family dwelling in the area commonly known as Dunescape (Tr. 15, 19, 23, 24, 31, 32, 52, 69). Further, based on the issues previously mentioned the variances granted do not substantially interfere with the comprehensive plan.*

The BOARD NOW DECIDES that request no. B-114-05 BE AND IS HEREBY GRANTED based upon the above listed findings. The specific bulk and developmental standard variances are outlined in the Amended Petition for Variances from Bulk and Developmental Standards and for Special Use filed by the Petitioner with the Board of Zoning Appeals on September 9, 2005 are hereby GRANTED.

(App. at 1011-12.) In affirming the BZA's grant of those variances, the trial court found:

> Developmental Standard Variance
>
> 35. The evidence is overwhelming that the current building does not comply with multiple developmental standard ordinances dealing with such things as height, bulk, and area.
>
> 36. The BZA is only authorized to grant variances from the terms of the zoning ordinances that will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the chapter will result in unnecessary hardship, and so that the spirit of the chapter shall be observed and substantial justice done. Art. XI § 160.124(A)(2)(d).
>
> 37. Specifically, Developmental Standard Variances may be approved only upon a determination that:
>
> 1. The approval will not be injurious to the public health, safety, morals and general welfare of the community.
>
> 2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner.
>
> 3. The strict application of the terms of the zoning code will result in practical difficulties in the use of the property. *Id.* at Art. XI § 160.124(B)(4)(q)(1-3).
>
> 38. The requirements of Article XI § 160.124(B)(4)(q)(1) regarding public safety, etc., are the same as those found for a Special Use under Article XI § 160.126(C)(2). Under the same analysis found in paragraph 25 supra, the evidence is not so proportionately meager as to lead to the conclusion that the Board's finding does not rest on a rational basis or was an abuse of discretion.
>
> 39. The requirements of Article XI § 160.124(B)(4)(q)(2) regarding the use and value of property are substantially the same as those found for a Special Use under Article XI § 160.126(C)(3). *Id.* at XI § 160.124(B)(4)(q)(2). Under the same analysis as found in paragraph 26 supra, the evidence is not so proportionately meager as to lead to the conclusion that the Board's finding does not rest on a rational basis, nor was it an abuse of discretion.
>
> 40. The amended findings of the BZA combine facts to support the requirements found in paragraph 3, which include practical difficulties under Article XI § 160.124(B)(4)(q)(3), and unnecessary hardship under Article XI § 160.124(A)(2)(d). The record contains evidence that the land values in the area are such that building a single family home in conformance with the requirements of land zoned R1 is not financially feasible. See Transcript p. 23. While this may create a practical difficulty it does not necessarily represent an unnecessary hardship. The

> determination of the existence of an unnecessary hardship is governed by all the relevant factors which, when taken together, indicate that the property cannot reasonably be put to a conforming use because of limitations imposed upon it by the ordinance. It must also be shown that the land involved cannot yield a reasonable return if used only for the allowed zoned purposed, and that the use authorized by the variance will not alter the essential character of the locality. The Light Co., Inc. v. Houghton, 226 N.E.2d 341 (Ind. Ct. App. 1967).
>
> In this instance, Meridian sought numerous developmental variances. There was evidence to support the finding of the BZA that many structures in Sheridan Beach do not conform with developmental standards and bulk requirements. There is also evidence that the land values in this area are quite high. Although economic hardship alone is not sufficient, it would be a significant hardship if Meridian was denied developmental and bulk variances when many or most of the structures in that neighborhood are in violation of the very same ordinances. See Transcript p. 7, 8. Accordingly, the Board's findings rest on a rational basis.
>
> The Board of Zoning Appeals decision to grant Meridian a Developmental Standard Variance was not an abuse of discretion and is affirmed.

(*Id*. at 18.)

Appellants challenge the portion of the trial court's finding number 40 in which the court found "it would be a significant hardship if Meridian was denied developmental and bulk variances when many or most of the structures in that neighborhood are in violation of the very same ordinances." (*Id.*) Appellants note the trial court cites pages seven and eight of the Transcript to support that finding, but those pages of the Transcript contain only comments by Meridian's counsel, which the court earlier declined to consider as evidence that could support the BZA's decision. (*See id*. at 14) ("The comments of counsel, of course, are not evidence.").

Although the trial court may not have cited evidence to support that finding, such evidence did exist in the record. Matthew Kubik, who had owned multiple properties in

the area, testified before the BZA that most of the surrounding homes were built in the 1920s and were "never conforming to what you would consider to be R-2 development." (App. at 541.) He also stated, "Every project that I know of that has been built and has contributed to the improvement of [this area] since the early 1980s has required some type of variance. There is almost no property that conforms to R-2 zoning in [the area]." (*Id.* at 541-42.) Siegel testified before trial court, "the vast majority of properties within [this area] cannot meet the bulk and development requirements of the R-2 district." (*Id*. at 77.) He admitted it also "appears to be the case" that the majority of residences in the area are also nonconforming structures." (*Id*. at 78.) Accordingly, Appellant's challenge to the trial court's affirmation of the BZA's grant of developmental standard and bulk variances fails, and we affirm the BZA's grant of those variances.

3. Non-Conforming Use Variance

Regarding Meridian's request for, and the BZA's grant of, a non-conforming use variance, the trial court found:

> Non-Conforming Use
>
> 30. Non-Conforming Use is defined in Article I § 160.005 as "[a]ny building or structure and the use thereof or the use of the land that does not conform with the regulations of this chapter or any amendment thereto governing use in the district in which it is located but which conformed with all of the codes, ordinances, and other legal requirements applicable at the time the building or structure was erected, enlarged or altered and the use there of [sic] or the use of land was established." CZO, Art. I § 160.005.
>
> 31. The terms "special use", "use" and "non-conforming use" all have different meanings under the zoning ordinances. Interpreting the meaning of these terms in relationship to each other can be difficult.
>
> 32. The use exception for non-conforming structures, structures and uses applies to a structure that did conform with the zoning ordinances when built, but no longer conforms as a result of changes in zoning laws.

> *There is no evidence in the record concerning the ordinances in effect when the original structure was built and whether the building conformed to the previous ordinances.*
>
> 33. It seems as though this issue is raised because the shape of the original foundation of the building was used in large part for the new building. This would only be applicable if there was evidence that the previous building conformed with the zoning ordinances in place when the building was built.
>
> 34. Accordingly, it is not necessary to review the BZA's finding on Non-Conforming Use.

(*Id.* at 15-16.)

Appellants argue the trial court erred by concluding it did not need to decide whether the BZA's grant of Non-Conforming Use was valid. We agree the court erred.

To receive an exception from the zoning requirements based on nonconforming use, the nonconforming building or use of the land must conform with "all the codes, ordinances, and other legal requirements applicable at the time the building or structure was erected, enlarged, or altered, and the use thereof of the use of land was established." CZO § 160.005. We agree with the trial court that no evidence was presented to the BZA regarding whether the nonconforming features of Meridian's proposal conformed with all legal requirements when the foundation was originally built. However, that finding should have led the court to conclude Meridian's proposal was not eligible for a nonconforming use exception and the BZA would have erred had it granted such an exception.

Nevertheless, as Meridian notes: "Although the headings of the findings of fact adopted by the BZA include the language 'and determination regarding non-conforming use status' no findings were made in regards to that status . . . ." (Appellee's Br. at 29.)

We also note the conclusion of the BZA's order, purportedly regarding both developmental standard variances and nonconforming use, granted the bulk and developmental standard variances without mentioning nonconforming use: "The specific bulk and developmental standard variances as outlined in the Amended Petition for Variances from Bulk and Developmental Standards and for Special Use filed by the Petitioner with the Board of Zoning Appeals on September 9, 2005 are hereby GRANTED." (App. at 1012.) Accordingly, the BZA's order did not address, or grant, a nonconforming use variance for Meridian's proposal.

We find the BZA's failure of no moment because, as Meridian notes, "the non-conforming use status became a moot point once the developmental standard variances and special use was granted." (Appellee's Br. at 29.) Regardless whether the building had been nonconforming, the BZA gave Meridian all the variances it needed to build.

For all these reasons, we affirm the BZA's grant of Meridian's petition for a special use variance and for developmental standard and bulk variances.

Affirmed.

RILEY, J., and KIRSCH, J., concur.